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In The Supreme Court Of The United States

OCTOBER TERM 1996

PATENT OFFICE PROFESSIONAL ASSOCIATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are impermissible statutory interpretations made by the General Counsel of the Authority subject to judicial review under 5 U.S.C. 7123?

2. Did D.C. Circuit err in concluding, contrary to *Montana Air Chapter No. 29, Association of Civilian Technicians v. Federal Labor Relations Authority*, 898 F.2d 753 (CA9 1990), that impermissible statutory interpretations of 5 U.S.C. 7114 (b)(4) made by the General Counsel of the Authority are not subject to judicial review?

3. Did D.C. Circuit err in concluding, contrary to *Montana Air Chapter No. 29, Association of Civilian Technicians v. Federal Labor Relations Authority*, 898 F.2d 753 (CA9 1990), that the General Counsel of the Authority made no statutory interpretations of 5 U.S.C. 7114 (b)(4) subject to judicial review in case in which the General Counsel made statutory interpretations of *data*, *furnish*, *upon request* and *necessary*?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner is the Patent Office Professional Association (POPA or Union), an exclusive representative under Chapter 71 of title 5 of the United States Code. The Federal Labor Relations Authority (Authority or FLRA) is the Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in case No. 96-1231 appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals dismissed case No. 96-1231 was March 31, 1997. A timely petition for rehearing was denied by the United States Court of Appeals on June 23, 1997, and a copy of the order denying rehearing appears at Appendix E.

The jurisdiction of this Court is invoked under 5 U.S.C. 7123(c) and 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 7103. Definitions; applications

(a) For the purpose of this chapter-

* * *

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

* * *

5 U.S.C. 7114. Representational rights and duties

* * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation-

* * *

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining;

* * *

5 U.S.C. 7123. Judicial Review

(a) Any person aggrieved by any final order of the Authority other than an order under-

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or

in the United States Court of Appeals for the District of Columbia.

* * *

The remainder of 5 U.S.C. 7123 appears in Appendix F.

5 C.F.R. 2423.10 Determination not to issue complaint; review of action by the regional Director.

* * *

(e) The General Counsel may sustain the Regional Director's refusal to issue or re-issue a complaint, stating the grounds of affirmance, or may direct the Regional Director to take further action. The General Counsel's decision shall be served on all the parties. The decision of the General Counsel shall be final.

The following other statutes involved in this case appear in Appendix F: 5 U.S.C. 551, 701, 706, 7104, 7105 and 7118.

STATEMENT OF THE CASE

When the General Counsel of the Authority makes impermissible interpretations of a statute in Chapter 71 of title 5, can a union obtain judicial review? The Ninth Circuit in *Montana Air Chapter No. 29, Association of Civilian Technicians v. FLRA*, 898 F.2d 753 (CA9 1990) (*Montana Air Chapter*) holds yes. The D.C. Circuit in this case holds no. The statute involved in this case is 5 U.S.C. 7114 (b)(4), which requires an agency to furnish to the union upon request data which is reasonably available and necessary. In the petition for review before the D.C. Circuit under 5 U.S.C. 7123, the Union claims that the General Counsel of the Authority has made impermissible statutory interpretations of *data*, *furnish*, *upon request* and *necessary*. The D.C. Circuit order granted the motion by the Authority to dismiss for lack of subject matter jurisdiction. A union has no way to enforce section 7114 (b)(4),

when the General Counsel of the Authority does not follow established case law and there never can be judicial review.

The Grievance

The case arose out of a grievance proceedings in the U.S. Patent and Trademark Office (PTO or Office), an agency in the Department of Commerce. The grievance was filed because Mr. James Cooper, a personnel employee within the PTO, decided to prevent the grievant from being admitted to the Maryland Bar. Mr. Cooper knew that the Maryland Bar would send an employment inquiry to the PTO. The PTO receives over 50 State Bar inquires a year. The PTO's procedure is to verify the employment and return the inquiry to the State Bar. Mr. Cooper knew that if a State Bar did not receive a response from the PTO after numerous attempts to contact the agency by mail, the State Bar would call the PTO. This telephone call would be forwarded to Mr. Cooper. Mr. Cooper's scheme was to make sure that the PTO did not respond to the grievant's Maryland Bar employment inquiry, thereby giving him the opportunity to make negative comments about the grievant during the phone call. Mr. Cooper arranged for the grievant's Maryland Bar inquiries to be flagged, so no response would be made. When the Maryland Bar called, Mr. Cooper implied that the grievant had committed a serious ethical violation. Had there been no negative comments by Mr. Cooper, a grievance would not have been filed.

During the grievance proceedings, the Union made a data request under 5 U.S.C. 7114 (b)(4). This led to a unfair labor practice charge filed by the Union with the Federal Labor Relations Authority under 5 U.S.C. 7118, which led to the petition for review of impermissible statutory interpretations of the General Counsel of the Authority, filed by the Union with the D.C. Circuit under 5 U.S.C. 7123.

The Data Request

On January 23, 1995, the Union made the original request for data by 26 questions. On July 13 and November 3, 1995, the Union renewed requests for data by questions #3, 5-9, 11-18, 22 and 23, which the PTO had not yet furnished. The PTO had made only a partial response on June 13, almost 5 months after the data request, and on October 17, over 3 months after the renewed request for data. An example question is:

> *3. Provide the Office policy guidelines for making comments with regard to the character of PTO employees to a member of a bar character committee.*

Only the Agency can provide the data requested. The Agency does not deny that it has the information, nor has the Agency raised any countervailing anti-disclosure interest in refusing to disclose the data requested by #3 and the other questions. The Union estimates that the PTO could prepare a written copy of all data requested by questions #3, 5-9 and 11-15 within one hour total time.

The Federal Labor Relations Authority

On July 28, 1995, the Union filed a unfair labor practice charge with the Authority, because of the lack of a timely response from the PTO, and because the response on June 13 did not furnish the information requested by most questions. As remedies, the Union requested that the Agency be ordered to respond to information requests within two weeks, where reasonably possible, and be ordered to furnish fully the data not yet provided.

On December 19, 1995, the Authority sent a unilateral settlement agreement, which considers only questions #16, 17, 22 and 23. For #22 and 23, the Settlement Agreement requires the PTO to furnish the data requested within 7 days. However, for #16 and 17, the Settlement Agreement merely allows the Union access to boxes of documents. The Settlement Agreement does not require the PTO to furnish the data

requested by questions #16 and 17. The Settlement Agreement does not address that the Agency timely furnish information upon request in the future, nor mention at all data requested by questions #3, 5-9, 11-15 and 18, to which the Union appears entitled under section 7114 (b)(4). On December 29, 1995, Union sent objections to the unilateral settlement, because, as a matter of law, the settlement does not comply with 5 U.S.C. 7114 (b)(4), with regard to *data*, *furnish* and *upon request*.

The Union next received the Regional Director's decision, dated January 24, 1996 (App. C), not to issue a complaint, and the approval of the Settlement Agreement, which accompanies the decision. The Regional Director's decision agrees that questions #11, 16, 17, 18, 22 and 23 request data. The decision alleges that questions #3, 5-9 and 12-15 do not request data and are non-statutory, because there is no requirement under section 7114 (b)(4) that an agency respond to interrogatory style questions. The decision alleges data requested by questions #11 and 18 are not necessary or relevant to the processing of the grievance at issue.

On February 23, 1996, the Union filed an appeal of the Regional Director's decision to the General Counsel of the Authority because, as a matter of law, the Regional Director's decision and Settlement Agreement disregards section 7114 (b)(4), with regard to *data*, *furnish*, *upon request* and *necessary*, and furthermore promotes litigation rather than cooperation between the PTO and Union. The appeal cited FLRA cases for the proposition that section 7114 (b)(4) does prescribe a clear and mandatory duty for an agency to respond to interrogatory style questions.

The Union next received the final decision of the General Counsel, dated May 10, 1996 (App. B), which denied the appeal of the Regional Director's decision. The final decision for the first time alleged that the information requested but not furnished was not supported by the establishment of a

"particularized need", citing *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, and NTEU*, 50 FLRA 661 (1995), which had been decided July 31, 1995, after the Union had filed the unfair labor practice charge. The final decision does not explain why the appeal should be denied when the Regional Director's decision does not mention "particularized need", nor cite *Internal Revenue Service*. The final decision also states: "that an activity is required to respond to interrogatories under the Statute" is "a proposition not established in the case law", but cites no case law counter to the FLRA cases cited by the Union for the proposition.

On May 22, 1996, the Union filed a motion for reconsideration of the final decision of the General Counsel. In the motion, the Union articulated the "particularized need" for each item of data still requested (App. G), noted that the final decision did not address the issues raised in the appeal, and again cited the FLRA cases for the proposition that section 7114 (b)(4) does prescribe a clear and mandatory duty for an agency to respond to interrogatory style questions. For question #3, *supra*, for example, the "particularized need" was explained as:

> "*3. Provide the Office policy guidelines for making comments with regard to the character of PTO employees to a member of a bar character committee.*
>
> The Agency states that Mr. Cooper's comment, that Howard Stern 'should check the answer to that question about ethical conduct carefully', is consistent with Office policy. This data is necessary to fully understand the Office policy. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing. The Union

> will also use this data to advise other members of the bargaining unit."

The Union needs the policy guidelines requested by question #3, because the comments of James Cooper of the PTO to Howard Stern, a member of the Maryland Bar Character Committee, is the crux of the grievance.

In September 1996, the General Counsel of the Authority denied the motion for reconsideration (App. D). The General Counsel did not provide any reason why a particularized need has not been shown for the data for question #3 and the other questions. On July 9, 1996 and May 22, 1997, the Union informed the Authority that the PTO had not complied with the requirements of the unilateral Settlement Agreement. The PTO still has not complied. The Union also asked the Authority how the Union should now proceed to establish a particularized need for the data requested by question #3 and the other questions.

Under 5 C.F.R. 2423.10(e), the decision of the General Counsel of the Authority on statutory interpretations is final. There is no way for a union to obtain review of impermissible statutory interpretations of the General Counsel from the three members of the Authority.

The Court of Appeals

On July 3, 1996, the Union filed the Petition for Review with the D.C. Circuit under 5 U.S.C. 7123. The Union sought review of impermissible statutory interpretations of 5 U.S.C. 7114 (b)(4) made by the General Counsel of the Authority, with regard to *data*, *furnish*, *upon request* and *necessary*. On July 19, 1996, the Union filed the Statement of Issues to be Raised:

> (a). Does *data* under 5 U.S.C. 7114 (b)(4) encompass more than designated documents?
>
> 1(b). Does 5 U.S.C. 7114 (b)(4) require an agency to respond to interrogatory style questions?
>
> 2. Does 5 U.S.C. 7114 (b)(4) require that an agency *furnish* a written copy of the data requested?

3. Does *upon request* under 5 U.S.C. 7114 (b)(4) require an agency to timely furnish data?

4(a). Under 5 U.S.C. 7114 (b)(4), may the exclusive representative (union), rather than the agency or the Federal Labor Relations Authority, determine what data the union needs to discharge its representational responsibilities?

4(b). Is data *necessary* under 5 U.S.C. 7114 (b)(4), where the union requests the data in order to adequately represent a grievant during grievance proceedings and the agency does not state any countervailing anti-disclosure interest in refusing to disclose the data?

On August 15, 1996, the Authority filed its certificate which states: "The ruling under review in this case is the Authority's decision in *U.S. Patent and Trademark Office*, Case No. WA-CA-50607 on May 10, 1996." The Authority also filed a motion to dismiss the Petition for Review for lack of subject matter jurisdiction. The Authority relied on *Turgeon v. FLRA*, 677 F.2d 937 (CADC 1982) (per curiam) (*Turgeon*) for the motion.

On August 22, 1996, the Union filed an opposition to the motion to dismiss. The Union cited *Montana Air Chapter*, *supra*, 898 F.2d, at 756-758, 763, for the proposition that courts of appeals have subject matter jurisdiction to review statutory interpretations made by the General Counsel of the Authority. The Union noted that the D.C. Circuit did not consider the issue of its jurisdiction to review statutory interpretations of the General Counsel of the Authority in *Turgeon*. The Union also cited the statement of House manager William D. Ford in *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Committee Print No. 96-7, November 19, 1979, pages 999-1000 (*Legislative History*), Congressional Record, Vol. 124, Part 28, October 14, 1978,

page 38718, for the proposition that Congress intended courts of appeals to review, under 5 U.S.C. 7123, new statutory interpretations of section 7114 (b)(4) made by the General Counsel of the Authority. On August 30, 1996, the Authority filed a reply to the opposition.

On March 31, 1997, the D.C. Circuit order granted the motion to dismiss the petition for review for lack of subject matter jurisdiction (App. A). The order cites *Turgeon*. The order does not mention *Montana Air Chapter*.

On May 15, 1997, the Union filed a petition for rehearing by the panel and a request for rehearing *in banc*. The Union argued that the panel decision is in conflict with the Ninth Circuit in *Montana Air Chapter*. On June 23, 1997, one D.C. Circuit order denied the suggestion for rehearing *in banc*. The other D.C. Circuit order by the panel denied the petition for rehearing (App. E). The order does not mention *Montana Air Chapter*.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter*, *supra*, and the D.C. Circuit in this case. In *Montana Air Chapter*, the Ninth Circuit reviewed the General Counsel's decision declining to issue an unfair labor practice complaint and held that "the General Counsel made impermissible statutory and regulatory interpretations which formed the basis of his decision not to issue an unfair labor practice complaint." 898 F.2d, at 763. The Ninth Circuit found exceptions to the presumption that the decision of the General Counsel of the Authority declining to issue an unfair labor practice complaint is not subject to judicial review, citing this Court in *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (*Chaney*) and opinions of the D.C. Circuit. The exceptions suggested by the Ninth

Circuit in *Montana Air Chapter* apply in the present case. In contrast, the D.C. Circuit in this case grants the Authority's motion to dismiss and holds the "General Counsel's decision declining to issue an unfair labor practice complaint is not subject to judicial review" (App. A). In contrast to *Montana Air Chapter*, this appears to mean that, for the D.C. Circuit, there can not be judicial review, even when the General Counsel of the Authority makes new impermissible statutory interpretations, and does not follow the established law.

By this case, this Court could clarify whether the General Counsel of the Authority can decide to follow impermissible statutory interpretations safe from judicial review. A presumption of nonreviewability of the General Counsel's decision to not issue an unfair labor practice complaint makes essential that impermissible statutory interpretations, which form the basis of the decision, are subject to judicial review. The General Counsel of the Authority should follow the correct law. This Court could clarify whether the General Counsel's exercise of discretion extends to making impermissible statutory interpretations not subject to judicial review, in view of *Chaney*, *supra*, and *Interstate Commerce Commission v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 (1987) (*BLE*).

In particular, this Court could clarify whether the General Counsel of the Authority can disregard 5 U.S.C. 7114 (b)(4), without judicial review. This case is important to federal employees, because a union has no way to enforce section 7114 (b)(4), when the General Counsel of the Authority does not follow established case law and there never can be judicial review. This case is important, because statutory interpretations of *data*, *furnish*, *upon request* and *necessary* arise any time any union requests data from an agency. A union should have some way to enforce 5 U.S.C. 7114 (b)(4). When a union claims that the General Counsel has made impermissible statutory

interpretations, and does not follow established law, then the union should be able to obtain judicial review.

I. Impermissible statutory interpretations made by the General Counsel of the Authority are subject to judicial review under 5 U.S.C. 7123.

For insight into the crucial need for judicial review in the context of an unfair labor charge, see the statement of House manager William D. Ford in *Legislative History*, *supra*, at pages 999-1000, Congressional Record, Vol. 124, Part 28, October 14, 1978, page 38718:

> "But if, in the beginning or later, the Authority refuses to follow its mandate, we expect the courts to vigorously defend the rights of employees and their representatives under title VII against misinterpretation or half-hearted enforcement by the Authority.
>
> * * *
>
> But when a party arrives in court claiming a failure of the Authority to follow title VII, we expect the court to consider the party's claim and evaluate the Authority's decision thoroughly.
>
> * * *
>
> We are, however, also realistic in our recognition that the Authority's task is far more difficult than that of the National Labor Relations Board. When the Authority is deciding an unfair labor charge against an employer, for example, it is weighing the possible misconduct of another Government agency. We are not blind to the sympathy that may develop between these two Federal entities. But we have made as clear as we can our expectation that the Authority is to perform vigorously its 'special prosecutor' functions.
>
> Moreover, in establishing judicial review we expect that the courts will scrutinize the actions of the

> Authority with less of the deference given other administrative agencies."

With respect to legislative history, the D.C. Circuit has found the statement of Representative Ford on October 14, 1978 "illuminating". *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (CADC 1983) ("The following statement by Representative Ford is even more illuminating") (Scalia, Circuit Judge, opinion for the court). The above statements of Representative Ford on the need for judicial review are also illuminating.

His reference to "misinterpretation or half-hearted enforcement by the Authority", "When the Authority is deciding an unfair labor charge against an employer", and "our expectation that the Authority is to perform vigorously its 'special prosecutor' functions" certainly suggests the Congress intended some judicial review of decisions of the General Counsel of the Authority. Under 5 U.S.C. 7118, it is the General Counsel of the Authority, rather than the three members, who "shall investigate the charge." The Congress would expect that the General Counsel of the Authority "is to perform vigorously its 'special prosecutor' functions."

Order Includes Decision

Representative Ford referred to "evaluate the Authority's decision thoroughly" rather than the "Authority's order", as in section 7123(a). The Congress did not intend to distinguish between "order" and "decision" in section 7123(a). The Conference Report No. 95-1717, October 5, 1978, stated:

> "B. JUDICIAL REVIEW OF THE DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY
>
> The Senate bill [S.2640] made reviewable in court decisions of the Authority concerning unfair labor practices, including awards of arbitrators relating to unfair labor practices.

* * *

> In the House bill [H.R.11280], unfair labor practice decisions are appealable as in the Senate." *Legislative History*, at 821.

Thus, in 5 U.S.C. 7123(a), "Authority's order" includes Authority's decision.

Authority Includes General Counsel of the Authority

Also, the Congress did not intend to distinguish between "Authority" and the "General Counsel of the Authority" in section 7123(a). According to 5 U.S.C. 7103 (a)(6): "'Authority' means the Federal Labor Relations Authority described in section 7104(a) of this title". Section 7104(a) then has: "The Federal Labor Relations Authority is composed of three members". Thus "Authority" clearly includes the three members of the Authority. Furthermore, section 7104 (f)(1) begins: "The General Counsel of the Authority", so that Authority appears to include the General Counsel of the Authority as well. In S.2640, August 24, 1978, section 7203(b) had: "The Authority shall consist of three members" while section 7203(g) had: "There is established within the Authority an Office of General Counsel." *Legislative History*, at 565-566. The language "within" or "of the Authority" certainly suggests that the Congress intended "Authority" to include the General Counsel of the Authority. Moreover, in its certificate, filed August 15, 1996, the Authority refers to the decision in this case as the "Authority's decision".

Legislative History of Judicial Review

In S.2640, a union could file "complaints of unfair labor practices . . . with the Authority." *Legislative History*, at 583-584. Then the General Counsel would "make final decisions as to whether to issue notices of hearing on unfair labor practice complaints and prosecute such complaints before the Authority". *Legislative History*, at 570. In S.2640, what became 5 U.S.C. 7123(a) was section 7216 (f)(1), which stated:

> "Any employee or agency adversely affected or aggrieved by a final order or decision of the Authority with respect to a matter raised as an unfair labor practice under this section, or with respect to an exception filed to any arbitrator's award under section 7221(j) of this title which involves an unfair labor practice complaint, may obtain judicial review of such an order or decision." *Legislative History*, at 584.

The reference to "final decision" as well as "final order" suggests that a final decision of the General Counsel "within the Authority" was intended to be subject to judicial review. The Conference Report, *supra*, *Legislative History*, at 821, suggests that 5 U.S.C. 7123(a) did not change judicial review of unfair labor practice matters from either the Senate bill or the House bill. Hence, the Congress intended that some decisions of the General Counsel of the Authority would be subject to judicial review under 5 U.S.C. 7123. From the statements of Rep. Ford, *supra*, the Congress intended statutory interpretations of the General Counsel of the Authority to be subject to judicial review under 5 U.S.C. 7123.

By statute, the three members of the Authority could probably review statutory interpretations of the General Counsel. However, under 5 C.F.R. 2423.10(e), the decision of the General Counsel of the Authority on statutory interpretations is final. There is no way for a union to obtain review of impermissible statutory interpretations of the General Counsel from the three members of the Authority. So then a union should be able to obtain judicial review of impermissible statutory interpretations of the General Counsel of the Authority under 5 U.S.C. 7123.

Heckler* v. *Chaney

Under 5 U.S.C. 701 (a)(2), the General Counsel's decision declining to issue an unfair labor practice complaint is presumed not subject to judicial review, because an agency decision not to

take enforcement action is "committed to agency discretion by law." *Chaney*, *supra*, 470 U.S., at 832. For the General Counsel of the Authority, that law appears to be 5 U.S.C. 7118 (a)(1): "the General Counsel . . . may issue and cause to be served upon the agency or labor organization a complaint." The word "may" connotes discretion.

However, neither section 7118 (a)(1) nor any other section of Chapter 71 commits statutory interpretations to the discretion of the General Counsel of the Authority. Moreover, it is inconceivable that the Congress would intend that the General Counsel would have discretion to make impermissible interpretations of section 7114 (b)(4) or any statute in Chapter 71 of title 5. From the statements of Representative Ford, *supra*, the Congress intended "misinterpretation or half-hearted enforcement by the Authority" and a "failure of the Authority to follow title VII [Chapter 71]" to be subject to judicial review. There is no reason why the General Counsel should be beyond the law, when exercising discretion under section 7118 (a)(1). Thus 5 U.S.C. 701 (a)(2) does not preclude judicial review of impermissible statutory interpretations of the General Counsel of the Authority. Such judicial review should not restrict the General Counsel's discretion under section 7118 (a)(1).

This Court in *Chaney* noted that there may be some judicial review in the context of nonenforcement decisions:

> "We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities. See *e.g.*, *Adams* v. *Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under

> 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion." 470 U.S., at 833 n.4.
>
> "Thus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct, *ante*, at 833, n.4; (2) an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams* v. *Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc), *ante*, at 833, n.4; . . . . It may be presumed that Congress does not intend administrative agencies, agents of Congress' own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." 470 U.S., at 839 (BRENNAN, J., concurring).

The noted exceptions to the nonreviewability presumption involve statutory interpretations by an agency. Thus this Court in *Chaney* did not appear to preclude judicial review of impermissible statutory interpretations in nonenforcement decisions.

ICC v. *BLE*

This Court in *BLE*, *supra*, held that an agency order which denies reconsideration of a prior order, on the same record, is not subject to judicial review. 482 U.S., at 280-284. Simply put, "the agency's refusal to go back over ploughed ground is nonreviewable." 482 U.S., at 284. The holding in *BLE* clearly does not apply to this case, because the petition for review before the D.C. Circuit was for the original final decision of the General Counsel of the Authority, dated May 10, 1996.

However, this Court in the opinion stated:

> "It does not establish, as the concurrence evidently believes, the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action,

> the action becomes reviewable. To demonstrate the falsity of that proposition it is enough to observe that a common reason for failure to prosecute an alleged criminal violation is the prosecutor's belief (sometimes publicly stated) that the law will not sustain a conviction. That is surely an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point; yet it is entirely clear that the refusal to prosecute cannot be the subject of judicial review." 482 U.S., at 283.

The statements stand for the proposition that even if the agency gives a "reviewable" reason for otherwise unreviewable action, the action remains unreviewable. The proposition is dicta, unless the action in question denies reconsideration of a prior order. The statements responded to the opinion of STEVENS, J., concurring in judgement, 482 U.S., at 288-291.

Even a prosecutor should follow the law. Even a prosecutor should not be beyond all judicial review. Even if the refusal of the General Counsel of the Authority to issue a complaint is not subject to judicial review, it is separate and compatible that impermissible statutory interpretations, which form the basis of the decision, are subject to judicial review.

Unlike the Respondent in *Chaney*, who asked the D.C. District Court to require the Food and Drug Administration (FDA) to take particular enforcement actions, the Union in this case only sought to have the D.C. Circuit rule on statutory interpretations of 5 U.S.C. 7114 (b)(4), with regard to *data*, *furnish*, *upon request* and *necessary*. Then the General Counsel of the Authority could follow the correct law, when exercising discretion under section 7118 (a)(1). The Union believes the General Counsel should follow the correct law. Without judicial review, there is no way to insure that the General Counsel of the Authority will follow the correct law, when the General Counsel makes impermissible statutory interpretations.

This Court should clarify whether the General Counsel's exercise of discretion extends to making impermissible statutory interpretations not subject to judicial review.

II. The D.C. Circuit erred in concluding, contrary to *Montana Air Chapter*, that impermissible statutory interpretations of 5 U.S.C. 7114 (b)(4) made by the General Counsel of the Authority are not subject to judicial review.

In *Turgeon*, the D.C. Circuit did not consider whether statutory interpretations made by the General Counsel are subject to judicial review. In *Martinez v. Smith*, 768 F.2d 479 (CA1 1985) (per curiam) and *American Federation of Government Employees, Local 1749, v. FLRA*, 842 F.2d 102 (CA5 1988) (per curiam), the First and Fifth Circuits considered subject matter jurisdiction of decisions of the General Counsel. However, neither the First nor the Fifth Circuit considered whether impermissible statutory interpretations of the General Counsel of the Authority are subject to judicial review. The decision in *Turgeon* was prior to *Chaney*. Although the decisions were after *Chaney*, neither the First nor the Fifth Circuit cited *Chaney*. Only the Ninth Circuit in *Montana Air Chapter* cited *Chaney*, with regard to judicial review of decisions of the General Counsel. In *Montana Air Chapter*, the Ninth Circuit held that impermissible statutory interpretations made by the General Counsel of the Authority are subject to judicial review. This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in *Turgeon*, since the D.C. Circuit and the Authority rely on *Turgeon*.

Subject Matter Jurisdiction

In *Montana Air Chapter*, 898 F.2d, at 756, the Ninth Circuit found that nonenforcement decisions of the General Counsel may be reviewable when:

> "a refusal by the agency to institute proceedings [is] based solely on the belief that it lacks jurisdiction" or

> "where it justifiably could be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."quoting *Chaney*, 470 U.S., at 833 n. 4.

Also, the Ninth Circuit found two exceptions recognized by the D.C. Circuit: "1) agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction", citing *International Longshoremen's Ass'n. v. National Mediation Bd.*, 785 F.2d 1098, 1100 (CADC 1986); and "2) an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable", citing *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 783 F.2d 237, 245 (CADC 1986) (*International Union*). With respect to the General Counsel of the Authority, the Ninth Circuit found:

> "Statutory interpretations promulgated in the course of an agency's nonenforcement also are reviewable in their own right . . . . When the FLRA implements a statutory interpretation in the course of a refusal to issue an unfair labor practice complaint, 'courts are emphatically qualified to decide whether an agency has acted outside of the bounds of reason." *Montana Air Chapter*, 898 F.2d, at 757-758, citing *International Union*, 783 F.2d, at 245.

The Ninth Circuit concluded that impermissible statutory interpretations made by the General Counsel of the Authority are subject to judicial review.

"evaluate the Authority's decision thoroughly"

In *Montana Air Chapter*, the union claimed the General Counsel had made impermissible statutory interpretations of 5 U.S.C. 7116(a) in the context of alleged violations of 5 U.S.C. 7114(c). On judicial review, the Ninth Circuit found that the General Counsel had made statutory interpretations:

> "Thus we find that the General Counsel's decision not to issue an unfair labor practice complaint was based on his belief that he lacked jurisdiction to issue such a complaint. We therefore must examine the General Counsel's statutory and regulatory interpretations to determine if his belief that he lacked jurisdiction was correct." 898 F.2d, at 757.
>
> "We find that the General Counsel issued a new legal interpretation of 5 U.S.C. 7116(a), grafting a bad faith requirement on that section's definition of unfair labor practice in the context of alleged violations of 7114(c). Such an interpretation is subject to judicial review." 898 F.2d, at 758.

On further evaluation, the Ninth Circuit found that the General Counsel had made impermissible statutory interpretations:

> "the General Counsel's decision was based on the mistaken belief that he lacked jurisdiction to issue an unfair labor practice complaint. . . . We also find that the General Counsel made impermissible statutory and regulatory interpretations which formed the basis of his decision not to issue an unfair labor practice complaint." 898 F.2d, at 763.

Discretion under 5 U.S.C. 7118 (a)(1)

The Ninth Circuit preserved the discretion of the General Counsel to issue an unfair labor practice complaint. The Ninth Circuit remanded the case:

> "to direct the General Counsel to exercise his discretion in accordance with this opinion's ruling on those interpretations. We do not hold that the General Counsel must issue an unfair labor practice in this case. We hold only that the General Counsel must consider the merits of the union's claim in accordance with his

statutory obligations and decide whether to issue such a complaint." 898 F.2d, at 763.

As shown in *Montana Air Chapter*, the General Counsel has discretion whether to issue an unfair labor practice complaint, when impermissible statutory interpretations are subject to judicial review. *Montana Air Chapter* is consistent with both *Chaney* and the statements of Representative Ford, *supra*, with regard to judicial review of decisions of the General Counsel. The Ninth Circuit followed the correct judicial proceedings.

The Court of Appeals

In contrast, the D.C. Circuit did not follow the correct judicial proceedings in this case. As shown in the Union's Statement of Issues to be Raised, the Union claimed the General Counsel of the Authority made impermissible statutory interpretations of 5 U.S.C. 7114(b)(4). For deciding the question of subject matter jurisdiction, the D.C. Circuit should have focused on the Union's Statement of Issues to be Raised. Statutory interpretations, as in the Issues to be Raised, should be subject to judicial review, as in *Montana Air Chapter*. In the motion to dismiss the Petition for Review for lack of subject matter jurisdiction, the Authority ignored the Union's Statement of Issues to be Raised. Accordingly, the D.C. Circuit should have denied the Authority's motion to dismiss.

The D.C. Circuit then should have evaluated the General Counsel's decision thoroughly, as in *Montana Air Chapter*. When the D.C. Circuit found that the General Counsel had made statutory interpretations of section 7114 (b)(4), then the D.C. Circuit should have evaluated whether the interpretations were impermissible. When the D.C. Circuit found that the General Counsel had made impermissible statutory interpretations of section 7114 (b)(4), then the D.C. Circuit should have remanded the case to the Authority for the General Counsel of the Authority to exercise his discretion whether to issue an unfair labor practice complaint in accordance with the

D.C. Circuit's ruling on the correct statutory interpretation of 5 U.S.C. 7114 (b)(4).

In contrast to the Ninth Circuit in *Montana Air Chapter*, the D.C. Circuit did not follow the correct judicial proceedings. This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in this case.

III. The D.C. Circuit erred in concluding, contrary to *Montana Air Chapter*, that the General Counsel of the Authority made no statutory interpretations of 5 U.S.C. 7114 (b)(4) subject to judicial review in case in which the General Counsel made statutory interpretations of *data*, *furnish*, *upon request* and *necessary*.

In the order which denied the rehearing (App. E), in addition to *Turgeon*, the D.C. Circuit cited *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 675-677 (CADC 1994) (*Crowley)*; *National Wildlife Federation v. EPA*, 980 F.2d 765, 773 (CADC 1992) (*National Wildlife Federation*); *International Union*, *supra*, 783 F.2d, at 245. *Crowley*, 37 F.3d, at 676, quotes and relies upon the noted dicta in *BLE*, *supra*, 482 U.S., at 283. The Ninth Circuit, in *Montana Air Chapter*, relied on *International Union*, 783 F.2d, at 245. *National Wildlife Federation*, 980 F.2d, at 773, cites *International Union*, 783 F.2d, at 245-246; *BLE*, 482 U.S., at 289 & n.1 (STEVENS, J., concurring in judgement); and *Montana Air Chapter*, 898 F.2d, at 756. In the opposition to the motion to dismiss and in the petition for rehearing, the Union cited both *International Union* and *National Wildlife Federation* to support the Ninth Circuit in *Montana Air Chapter*. Both *International Union* and *National Wildlife Federation* appear consonant with *Montana Air Chapter*. This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in *Turgeon* and *Crowley*, since the D.C. Circuit relied on *Turgeon* and *Crowley* in this case.

Subject Matter Jurisdiction

The order which denied the rehearing (App. E) states:

> "The General Counsel's decision in Case No. WA-CA-50607 does not announce a new substantive statutory interpretation, laying out a policy of general applicability, which could be reviewable in its own right."

However, any interpretation of *data*, *furnish*, *upon request* and *necessary* in 5 U.S.C. 7114 (b)(4) made by the General Counsel, clearly lays out a "policy of general applicability." Statutory interpretations of *data*, *furnish*, *upon request* and *necessary* arise any time any union requests data from an agency. The decision of the General Counsel did not limit the statutory interpretations to this case. They appear to apply to any union at any time.

The D.C. Circuit did not follow the correct judicial proceedings. The D.C. Circuit should have subject matter jurisdiction over statutory interpretations of section 7114 (b)(4), made by the General Counsel, since the interpretation "could be reviewable in its own right", according to the order. The D.C. Circuit erred in apparently requiring the Union to first prove that the General Counsel made a "new substantive statutory interpretation" in order to have judicial review. Note that Representative Ford, *supra*, stated:

> "But when a party arrives in court *claiming* a failure of the Authority to follow title VII [Chapter 71], we expect the court to consider the party's *claim* and evaluate the Authority's decision thoroughly." (Emphasis added).

In contrast to the D.C. Circuit, *claiming* does not mean *proving*. A union's *claim* should determine subject matter jurisdiction. Whether the General Counsel had announced a "new substantive statutory interpretation" was a question for judicial review, as in *Montana Air Chapter*. As shown in the Union's Statement of Issues to be Raised, the Union claimed the

General Counsel of the Authority made impermissible statutory interpretations of 5 U.S.C. 7114(b)(4), with regard to *data*, *furnish*, *upon request* and *necessary*. For deciding the question of subject matter jurisdiction, the D.C. Circuit should have focused on the Union's Statement of Issues to be Raised. Statutory interpretations, as in the Issues to be Raised, should be subject to judicial review, as in *Montana Air Chapter*. In the motion to dismiss the Petition for Review for lack of subject matter jurisdiction, the Authority ignored the Union's Statement of Issues to be Raised. Accordingly, the D.C. Circuit should have denied the Authority's motion to dismiss.

Statutory Interpretations

For example, the General Counsel did not require the PTO to furnish the policy guidelines requested by question #3:

> *3. Provide the Office policy guidelines for making comments with regard to the character of PTO employees to a member of a bar character committee*

According to the General Counsel, #3 does not request *data*. Even if #3 did, the General Counsel said the data requested by #3 was not supported by the establishment of a particularized need, i.e., not *necessary*. The decision of the General Counsel appears based on his statutory interpretations of *data* and *necessary*, rather than on any question of fact.

New Statutory Interpretation of *Data*

The statutory interpretation of *data* made by the General Counsel is stated in the decision by the Regional Director (App. C-3), for #3 and other questions:

> "The information requested in questions 3, 5, 6, 7, 8, 9, 12, 13, 14, and 15 constitutes interrogatory style questions and do not request information which is considered 'data' under section 7114(b)(4) of the Statute. . . . There is no requirement under section 7114(b)(4) of the Statute that an agency respond to questions."

The statement is clearly a general proposition of law, not restricted to this case. They appear to apply to any union at any time. No FLRA cases are cited for the proposition. The General Counsel does not follow established law on *data*. The established law is that 5 U.S.C. 7114 (b)(4) does require an agency to respond to interrogatory style questions. In the appeal of the Regional Director's decision to the General Counsel, the Union cited examples of interrogatory style questions in *Department of the Air Force, Air Force Logistics Command, and AFGE, Local 1857*, 37 FLRA 987, 989, 993 (1990) and *VA and AFGE, Local 3314*, 28 FLRA 260, 265-266, 273 (1987). There is no case which supports the General Counsel. Yet in the final decision (App. B), the General Counsel stated:

> "Even assuming for the sake of argument that an activity is required to respond to interrogatories under the Statute (a proposition not established in the case law), the information requested but not furnished was not supported by the establishment of a particularized need."

The General Counsel cited no FLRA cases to counter the Union proposition that section 7114 (b)(4) does require an agency to respond to interrogatory style questions. Yet the General Counsel stated the Union proposition is "not established in the case law."

In the motion for reconsideration of the final decision of the General Counsel, the Union again cited the FLRA cases for the proposition that section 7114 (b)(4) does prescribe a clear and mandatory duty for an agency to respond to interrogatory style questions. In the petition for rehearing before the D.C. Circuit, the Union also cited those FLRA cases, for the examples of interrogatory style questions. In addition, the Union cited examples of interrogatory style questions in *National Labor Relations Board v. ACME Industrial Co.*, 385 U.S. 432, 434 (1967). Those cases show that the General Counsel has made

a "new substantive statutory interpretation" of *data* in section 7114 (b)(4), and does not follow established law.

New Statutory Interpretation of *Necessary*

The General Counsel did not provide any reason why a particularized need has not been shown for the data for question #3 and the other questions. The General Counsel did not provide an opportunity for the Union to make a showing of "particularized need" for #3 and the other questions. The General Counsel does not follow the established law on *necessary*, which involves the balance between the particularized need of the union and the countervailing anti-disclosure interests of the agency. In this case, the PTO did not raise any countervailing anti-disclosure interest in refusing to disclose the data requested by #3 and the other questions. The established case law is that data is *necessary* under 5 U.S.C. 7114 (b)(4), where the union requests the data in order to adequately represent a grievant during grievance proceedings and the agency does not state any countervailing anti-disclosure interest in refusing to disclose the data. In the petition for rehearing before the D.C. Circuit, the Union cited the established law in *Internal Revenue Service*, *supra*, 50 FLRA, at 669-671; *NLRB v. FLRA*, 952 F.2d 523, 531-532 (CADC 1992); *U.S. Dept. of Veterans Affairs v. FLRA*, 1 F.3d 19, 23 (CADC 1993); *U.S. Dept. Of Justice v. FLRA*, 988 F.2d 1267, 1272 (CADC 1993). The Union requested the data by question #3 and the other questions in order to adequately represent a grievant during grievance proceedings. By established case law, the Union has a particularized need and the data is *necessary*. The cases cited by the Union show that the General Counsel has made a "new substantive statutory interpretation" of *necessary* in section 7114 (b)(4), and does not follow established law.

The General Counsel should follow the correct law. In this case, the General Counsel has made "new substantive statutory interpretations" of 5 U.S.C. 7114(b)(4), with regard to *data*,

furnish, *upon request* and *necessary*, which are impermissible. A union has no way to enforce section 7114 (b)(4), when the General Counsel of the Authority does not follow established case law and there never can be judicial review. A union should have some way to enforce 5 U.S.C. 7114 (b)(4). In contrast to the Ninth Circuit in *Montana Air Chapter*, the D.C. Circuit did not follow the correct judicial proceedings. This Court should grant the petition in order to resolve the conflict between the Ninth Circuit in *Montana Air Chapter* and the D.C. Circuit in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gene M. Munson
Counsel of Record
POPA Representative
Post Office Box 2521
Arlington, Virginia 22202
(703) 308-4925

3 September 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1231 September Term, 1996

Patent Office Professional Association,
Petitioner,

v.

Federal Labor Relations Authority,
Respondent.

U.S. COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT - FILED
MAR 31 1997
CLERK

BEFORE: Wald, Williams, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion to dismiss the petition for review, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The General Counsel's decision declining to issue an unfair labor practice complaint is not subject to judicial review under the Civil Service Reform Act of 1978, 5 U.S.C. §7123. See Turgeon v. Federal Labor Relations Authority, 677 F.2d 937 (D.C.Cir. 1982) (per curiam).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam
(S)
(S)
(S)

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
607 14th Street NW - Washington, D.C. 20424-0001
(202) 482-6600 FAX: (202) 482-6608

OFFICE OF THE GENERAL COUNSEL May 10, 1996

Gene Munson, Representative
Patent Office Professional Association
U.S. Patent & Trademark Office
P.O. Box 2521
Arlington, VA 22202

Re: U.S. Patent & Trademark Office
Case No. WA-CA-50607

Dear Mr. Munson:

Your appeal of the dismissal of certain allegations in the unfair labor practice charge in this case, and the approval of a Settlement Agreement concerning other allegations in this charge by the Acting Washington Regional Director has been carefully considered.

Your appeal is denied because the Acting Regional Director correctly concluded that the Activity did not act inconsistent with section 7114(b)(4) of the Federal Service Labor-Management Relations Statute by the manner in which it reSponded to certain of your requests for information. Even assuming for the sake of argument that an activity is required to respond to interrogatories under the Statute (a proposition not established in the case law), the information requested but not furnished was not supported by the establishment of a particularized need. Internal Revenue Service, Washington,

APPENDIX B

D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City Missouri, 50 FLRA 661 (1995) (requests must articulate with specificity why the information is needed, the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities; the request must contain sufficient particularity to allow an agency to make a decision on the request).

The Settlement Agreement of those allegations found meritorious also is consistent with the purposes and polices of the Statute and provides the Union with certain of the requested information in a manner that is consistent with the Privacy Act and accommodates the Union's interests in obtaining the information and the Activity's countervailing anti-disclosure interests. Accordingly, your appeal of the approval of the Settlement Agreement is denied.

Since the evidence does not establish that the allegations which are the subject of your appeal are supported by evidence to establish a violation of the Statute and since the Settlement Agreement furthers the purposes and polices of the Statute, the case is returned to the Region and the Settlement Agreement may now be implemented.

For the General Counsel.

Sincerely yours,
(S)
David L. Feder
Deputy General Counsel

cc: Regional Director, Washington

Barbara Mintz, Esquire, Office of the General Counsel, Patent & Trademark Office, 2101 Crystal Plaza Arcade, Suite 225, Arlington, VA 22202

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON REGIONAL OFFICE
1255 22nd Street, N.W., Suite 400
Washington, D.C. 20037-1206
(202) 653-8500 FAX: (202) 653-5091

January 24, 1996

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Gene Munson, Representative
Patent Office Professional Association
U.S. Patent & Trademark Office
P.O. Box 2521
Arlington, VA 22202

Re: U.S. Patent & Trademark Office
Case No. WA-CA-50607

Dear Mr. Munson:

This office has investigated the unfair labor practice charge you filed. I have carefully considered all of the evidence and conclude that issuance of a complaint is not warranted.

The amended charge alleges that the U.S. Patent and Trademark Office (PTO) failed to timely provide the Patent Office Professional Association (Union) with certain requested information as required by 5 U.S.C. section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute).

The investigation shows that on January 23, 1995, the Union,

APPENDIX C

through you, submitted a request for information under section 7114(b)(4) of the Statute. The information request consisted of twenty-six (26) individual questions. The Union alleges that the information is necessary and relevant to a grievance it filed which alleged, *inter alia*, that the PTO delayed the processing of a bargaining unit employee's employment verification request for the character evaluation section of the Maryland Bar, and that the employee received disparate treatment on his request to have the appropriate paperwork processed to facilitate his early-out retirement.

The investigation further shows that from January through June 1995, you spoke with PTO Labor Relations Specialist Matthew Kline several times and inquired as to when the PTO would provide the requested information. According to you, Kline repeatedly stated that the PTO was "working on it." During this time period, PTO and the Union agreed that the pending grievance would not be decided until the PTO had responded to the information request. The parties also agreed that the Union would be given a chance to file additional grievance papers once it had received the requested information.

On June 12, 1995, the PTO responded to the Union's request for information. According to the Union, PTO's response was untimely and incomplete. As a result, on July 13, 1995, the Union filed a renewed request for information with PTO with respect to those questions it found unsatisfactory, specifically, questions 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22 and 23. On July 28, 1995, the Union filed the instant unfair labor practice. Although, the PTO submitted its response to the Union's second information request on October 16, 1995, the Union remains dissatisfied with the PTO's response to all but question 4, and filed a third request for information on November 3, 1995.

As the Union alleges that several of the PTO's responses are inadequate, I will address each disputed request for information as follows:

Questions 3, 5, 6, 7, 8, 9, 12, 13, 14, and 15:

Under section 7114(b)(4) of the Statute, the exclusive representative is entitled to information that is necessary to enable it to carry out effectively its representational functions and responsibilities. As relevant here, a union is entitled to data which will assist it in the investigation, evaluation, and processing of a grievance. *See Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, New Bedford District Office, New Bedford, Massachusetts*, 37 FLRA 1277, 1286 (1990) *and cases cited therein.*

The information requested in questions 3, 5, 6, 7, 8, 9, 12, 13, 14, and 15 constitutes interrogatory style questions and do not request information which is considered "data" under section 7114(b)(4) of the Statute. For example, in questions 5, 6 and 8 the Union asks if a certain supervisor followed office policy. In addition, questions 7, 9, 12, 13, 14 and 15 are also interrogatory style questions, which seek to establish certain facts surrounding the event involved in the grievance and do not request data. There is no requirement under section 7114(b)(4) of the Statute that an agency respond to questions. Such questions are more appropriately handled during collective bargaining or grievance processing. While an agency may be required to respond to requests for information, where it could extract such information from other existing data, *see, for example, Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base California*, 37 FLRA 987 (1990), the questions referenced above do not seek data which is normally maintained by the PTO. Nor can

the information requested be extrapolated from existing data which is normally maintained by the PTO. As such, the PTO was not required under section 7114(b)(4) to provide answers to these questions. The fact that the PTO did respond to these questions does not create any further obligation under the Statute.

Question 11:

Question 11 requests the style and court date of a law suit referenced by the PTO in its response to the grievance. The PTO stated in its response to the informal grievance that the Employee Relations Division had discontinued the completion of state bar character questionnaires because of the potential for lawsuits by employees. The PTO also stated that one such suit had been filed.

The PTO has stated that it is not their policy to complete character questionnaires from state bars. The background and reasoning which motivated the PTO to formulate this policy is not relevant to the processing of the grievance which focuses on whether PTO followed its policy with respect to a particular employee. Thus, the style and court date of a related law suit is not relevant or necessary to the processing of this particular grievance.

Questions 16 and 17:

In questions 16 and 17, the Union requested that the PTO provide the number of employment verification requests received from the Maryland Bar and other state bars during 1991-1994. The PTO provided this information for 1994, but maintained that the information reuqested for 1991-1993 was not necessary or relevant for the processing of the grievance and was not reasonably available. According to the PTO, it receives thousands of employment verifications each year.

Those verifications are not categorized in any way and those received in 1991 through 1993 are presently located in off-site storage. As such, the PTO did not provide the information requested for 1991-1993.

While it is the PTO's position that it is not required to provide the above noted information, it has offered, as part of a Settlement Agreement, to provide the Union access to the boxes of documents in which this information is contained. The investigation shows that the PTO provided the information which reasonable available and necessary to the processing of the grievance, that is the 1994 information, and that the information requested for 1991 through 1993 is not reasonably available because it is not normally maintained by the PTO. Moreover, because the PTO has offered to provide the Union with access to the remainder of the information, I find that the PTO has not violated the Statute with respect to the above noted requests for information.

Question 18:

Question 18 requests that the PTO provide the number of employment verification inquiries completed by Mr. Cooper and Mr. Dolder. The investigation shows that the PTO provided this information in both its June and October responses by stating that such forms are filled out by the payroll processing employees. Mr. Cooper is not a payroll processing employee, and the Union is aware of this fact. Mr. Dolder works in the payroll processing division, however, the Union has not demonstrated that the identity of employees who fill out employment verification requests is necessary or relevant to the processing of the grievance at issue.

Question 21:

Question 21 requests that the PTO provide a copy of all

policy directives that concern plans for discontinued retirement. I find that the PTO provided the information requested information in its June response which listed all such relevant documents and noted that copies of them were attached to the PTO's informal grievance response.

Questions 22 and 23:

Questions 22 and 23 request that the PTO list the discontinued service retirements approved for 1994 and the early out retirements approved with effective retirement dates in 1995. PTO initially responded that such information was not necessary and relevant to the grievance. However, in a subsequent offer of settlement, the PTO agreed to provide the information requested in a sanitized form within 7 days of the signing of the Settlement Agreement.

By letter dated December 19, 1995, you were informed of the proposed Settlement Agreement, and given an opportunity to sign the settlement or to present the Union's written objections. By letter dated December 29, 1995, you objected to the Settlement Agreement alleging that it was inadequate because it did not insure that all information requested would be provided and because the PTO independently violated the Statute by its delay in providing the requested information.

I have considered your objections, but conclude that it would effectuate the purposes of the Statute to go forward with the Settlement Agreement unilaterally. While the PTO's initial response occurred five months after the request, the parties maintained a dialogue during that time period. In addition, the grievant was not prejudiced by the delay because the Union and the PTO agreed that grievant could submit a more detailed grievance once the information was received. The grievant did indeed file a more detailed grievance on July 7, 1995. Moreover, the PTO provided a bulk of the information

it was required to produce under section 7114(b)(4) of the Statute, as is willing to provide the remaining information pursuant to a Settlement Agreement.

Based on the foregoing facts and circumstances, I am refusing to issue a complaint in this case with regard to certain allegations hereby dismissed. I am approving unilaterally the Settlement Agreement attached hereto which effectively settles those aspects of the charge that would otherwise be considered meritorious.

If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. Please send me a copy of your appeal. You must notify all other parties that you have filed an appeal with the General Counsel. You are not required to send a copy of the appeal to the other parties.

Any appeal which you file must contain a complete statement of the reasons why you disagree with my decision. Your appeal must be filed with the General Counsel of the Federal Labor Relations Authority, 607 14th Street, N.W., Suite 210, Washington, D.C. 20424-0001. If you file your appeal by mail, it must be postmarked no later than February 23, 1996. If there is no postmark evident on the mailing, it will be presumed to have been mailed 5 days prior to receipt by the Office of the General Counsel. If you deliver your appeal personally, it must be received by the Office of the General Counsel no later than February 23, 1996.

If you need more time to file your appeal, you may write to the General Counsel to request an extension. A request for extension, whether mailed or delivered in person, must be received by the Office of the General Counsel at least 5 days before the date your appeal is due. You will find the procedures and time limits for filing an appeal in Vol. 5, Code

of Federal Regulations, sections 2423.10(c) and (d). These regulations may be found in any Authority office, public law library, and some large general purpose libraries and Federal Personnel Offices.

Sincerely,
(S)
Laurence M. Evans
Acting Regional Director

cc:

Barbara Mintz, Esq
Office of the General Counsel
Patent and Trademark Office
2101 Crystal Plaza Arcade
Suite 2225
Arlington, VA 22202

Michael D. Mossaman
Office of Appeals
Office of the General Counsel
Federal Labor Relations Authority

United States of America

FEDERAL LABOR RELATIONS AUTHORITY

U.S. PATENT AND TRADEMARK OFFICE (Respondent)	) CASE NO. WA-CA-50607
and	
PATENT OFFICE PROFESSIONAL ASSOCIATION (Charging Party/Union)	

SETTLEMENT AGREEMENT
(AGENCY RESPONDENT)

The undersigned Agency and the undersigned Charging Party in settlement of the above matter, and subject to the approval of the Regional Director on behalf of the Federal Labor Relations Authority, *HEREBY AGREE AS FOLLOWS*:

The Patent Office will provide the following sanitized information to the Union within 7 days of the Regional Director's approval of this agreement:

> The Discontinued Service Retirements approved for fiscal year 1994. For each person: list the position, the Group, if an examiner, the circumstances for retirement (e.g. reduction-in-force), when approved, the effective retirement date at the time of approval and the actual retirement date.
> The early out retirements approved with the effective

retirement dates in fiscal year 1995. For each person: list the position, the Group if an examiner, when approved, the effective date at the time of the approval and the actual retirement date.

The Patent Office will also provide the Union with access to the following information within 7 days of the Regional Director's approval of this agreement:

All employment verification inquiries received by the Patent Office during 1991, 1992 and 1993.

REFUSAL TO ISSUE COMPLAINT - In the event the Charging Party fails or refuses to become a party to this Agreement, and if the Regional Director concludes that it will effectuate the policies of Chapter 71 of Title 5 of the U.S.C., he shall decline to issue a Complaint herein and this Agreement shall be between the Agency and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 2423.11(b)(2) of the Regulations of the Federal Labor Relations Authority if an appeal is filed within twenty-five (25) days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of an appeal. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

PERFORMANCE - Performance by the Agency of the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director or, in the event the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Agency of advice that no appeal has been filed or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE - The undersigned

(party)(parties) to this Agreement will notify the Regional Director in writing what steps the Agency has taken to comply herewith. Such notification shall be made within five (5) days, and again after sixty (60) days, from the date of the approval of this Agreement, or, in the event the Charging Party does not enter into this Agreement, after the receipt of advice that no appeal has been filed or that the General Counsel has sustained the Regional Director.

COMPLIANCE WITH SETTLEMENT AGREEMENT - Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

_____

_____

U.S. Patent and Trademark Office
(Respondent/Agency)
By: Deanna Shepard, Chief
Labor Relations

/s/ J. Carson Cooper for Deanna Shepard

Patent Office Professional Association
(Charging Party/Union)
By: Mr. Gene Munson
POPA Representative

(NS) _____
(Signature)

Approved: January 22, 1996
By: /s/ Laurence M. Evans Acting for
Michael W. Doheny
Regional Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
607 14th Street NW - Washington, D.C. 20424-0001
(202) 482-6600 FAX: (202) 482-6608

OFFICE OF THE GENERAL COUNSEL

September 18, 1996

CORRECTED COPY

Gene Munson, Representative
Patent Office Professional Association
U.S. Patent & Trademark Office
P.O. Box 2521
Arlington, VA 22202

Re: U.S. Patent & Trademark Office
Case No. WA-CA-50607

Dear Mr. Munson:

Your Motion for Reconsideration of the denial of your appeal of the Regional Director's decision to dismiss your unfair labor practice charge in this case has been carefully considered.

In your Motion for Reconsideration you maintain that the appeal decision fails to address whether section 7114(b)(4) of the Federal Service Labor-Management Relations Statute requires an agency to provide responses to interrogatory style questions. Evening assuming that responses to interrogatory style questions do constitute data under the meaning of the Statute, the Union has failed to establish a "particularized need" for the information. As stated in the appeal decision, the Authority has

held that a request for information must establish a "particularized need" for the information. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995). Absent a showing of particularized need, there is no obligation to provide the requested information under section 7114(b)(4).

Moreover, even assuming that the Statute requires good faith responses to questions to facilitate collective bargaining, in this case, the agency responded to the request and there is no evidence that the agency refused to meet with the Union to discuss settlement of the dispute.

Accordingly, your Motion for Reconsideration is denied.

For the General Counsel.

Sincerely yours,
(S)
David L. Feder
Deputy General Counsel

cc: Regional Director, Washington

Barbara Mintz, Esquire, Office of the General Counsel, Patent & Trademark Office, 2101 Crystal Plaza Arcade, Suite 225, Arlington, VA 22202

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-1231 September Term, 1996

Patent Office Professional Association,
Petitioner,

v.

Federal Labor Relations Authority,
Respondent.

U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT - FILED
JUN 23 1997
CLERK

BEFORE: Wald, Williams, and Tatel, Circuit Judges

ORDER

Upon consideration of the petition for rehearing by the panel, it is

ORDERED that the petition be denied. As a general rule, the General Counsel's exercise of discretion not to file an unfair labor practice complaint is not subject to judicial review under the Civil Service Reform Act of 1978, 5 U.S.C. § 7123. See Turgeon v. Federal Labor Relations Authority, 677 F.2d 937 (D.C. Cir. 1982) (per curiam). Petitioner has not rebutted the presumption of unreviewability by establishing that the case fit under the exception it claimed. The General Counsel's decision in Case No. WA-CA-50607 does not announce a new substantive statutory interpretation, laying out a policy of general applicability, which could be reviewable in its own right. See Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 675-77 (D.C. Cir. 1994); National Wildlife Federation v. EPA, 980 F.2d 765, 773 (D.C. Cir.

1992); International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock, 783 F.2d 237, 245 (D.C. Cir. 1986).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: (S)
Deputy Clerk/LD

5 U.S.C. 551. Definitions

For the purposes of this subchapter-

* * *

(6) "order" means the whole or a part of a final disposition, whether affirmative , negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

* * *

5 U.S.C. 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter-

* * *

(2) "Person", "rule", "order", "license", "sanction", "relief", and" agency action" have the meanings given them by section 551 of this title.

APPENDIX F

35 U.S.C. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

35 U.S.C. 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of-

> (1) the date on which the member's successor takes office, or
> (2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may--

(A) investigate alleged unfair labor practices under this chapter,
(B) file and prosecute complaints under this chapter, and
(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

35 U.S.C. 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority--

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of

consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter--

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may--

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue supbenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

35 U.S.C. 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice--

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during 6-month period referred to in subparagraph (A) of this

paragraph by reason of--

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such

purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complain has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order--

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordane with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or indivduals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complain has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall

issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

35 U.S.C. 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under--

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeal in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order

unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a

restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

DATA REQUESTED

Under section 7114 (b)(4), the Union requests the following data which the Agency has not furnished (the numbers correspond to the numbers in the original request of January 23, 1995):

3. Provide the Office policy guidelines for making comments with regard to the character of PTO employees to a member of a bar character committee.

The Agency states that Mr. Cooper's comment, that Howard Stern "should check the answer to that question about ethical conduct carefully", is consistent with Office policy. This data is necessary to fully understand the Office policy. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing. The Union will also use this data to advise other members of the bargaining unit.

5. Did the Office direct Mr. Cooper to make such a comment when he said that Howard Stern "should check the answer to that question about ethical conduct carefully"? Answer yes or no.

This data is necessary to fully understand the role and conduct of James Cooper and the Agency in making negative comments to a member of the Maryland Bar Character Committee. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

6. Did Mr. Cooper follow Office policy when he said to Howard Stern that Mr. Silverberg had committed a "serious

ethical violation"? Answer yes or no. If yes, did the Office direct Mr. Cooper to make such a comment? Answer yes or no.

This data is necessary to fully understand the role and conduct of James Cooper and the Agency in making negative comments to a member of the Maryland Bar Character Committee. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

7. With regard to Mr. Silverberg and other PTO employees, will the Office allow Mr. Cooper or someone else to continue to tell a member of a bar character committee that he "should check the answer to that question about ethical conduct carefully"? Answer yes or no. If no, what will the Office do to prevent such conduct by Mr. Cooper or someone else in the future?

This data is necessary to fully understand Office policy. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing. The Union will also use this data to advise other members of the bargaining unit.

8. Did Mr. Cooper follow Office policy when he said to Howard Stern that the PTO did not respond to inquiries from state bars because of objections from POPA? Answer yes or no. If yes, did the Office direct Mr. Cooper to make such a statement? Answer yes or no.

This data is necessary to fully understand Office policy and the role and conduct of James Cooper and the Agency in making comments to a member of the Maryland Bar Character Committee. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the

content of the data, we may use this data as evidence at an arbitration hearing. The Union will also use this data to advise other members of the bargaining unit.

9. When did Deanna Shepherd contact Howard Stern with regard to his conversation with Mr. Cooper? Provide the substance of the contact.

The Agency states that Deanna Shepherd of the Agency spoke with Howard Stern. This data is necessary to fully understand the Agency role in investigation of the conversation which is the crux of the grievance. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

11. Give the style, court and date of the alleged lawsuit that was brought by a former patent examiner?

The Agency merely alleges without evidence that the Agency had discontinued the completion of employment verification forms "some time ago" because of a lawsuit by a former examiner. It is necessary to know the style, court and date of the alleged lawsuit to fully understand if such a lawsuit, with a consistent date, exists. If no such lawsuit exists, then the allegation would be evidence of lack of credibility on the part of James Cooper and the Agency. If there was a lawsuit, but which involved James Cooper, then there would be evidence on the motive, intent and practice of James Cooper in making comments to a bar inquiry. Note that the Agency raised the issue of an alleged lawsuit with respect to policy. Thus, the data on the lawsuit is necessary to fully understand the Agency policy, with regard to answering inquiries from state bars. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing. The

Union will also use this data to advise other members of the bargaining unit.

12. Provide the data which supports your statement that "the accusation was found to have no merit",i.e., the accusation in 1991 that Mr. Cooper made negative comments in response to a bar inquiry.

The Agency states that yes, James Cooper had been accused of making negative comments in response to a bar inquiry once in 1991, but alleges without evidence that "the accusation was found to have no merit". This data is necessary to understand fully if that Agency allegation has factual basis. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

13. Did the Agency through Mr. Cooper refuse to Mr. Silverberg to verify the employment portion of the Maryland Bar inquiry? Answer yes or no.

This data is necessary to fully understand the role and conduct of James Cooper and the Agency in answering state bar inquiries. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

14. Does Mr. Carl Dolder complete the employment verifications on bar inquiry forms? Answer yes or no. Who else?

This data is necessary as the only way to be able to compare the ordinary Agency processing of bar inquiries to the disparate treatment given the grievant. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration;

depending on the content of the data, we may use this data as evidence at an arbitration hearing.

15. When bar inquiries are received, to whom are they forwarded for processing? List all persons and their role in the processing?

This data is necessary as the only way to be able to compare the ordinary Agency processing of bar inquiries to the disparate treatment given the grievant. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

16. How many employment verification inquiries did the Office receive from the Maryland Bar, and how many of those verifications were completed, in 1993? 1992? 1991?

The Agency alleges that completion of verification forms had been discontinued "some time ago". The data requested in items #16 and #17 is necessary as the only way to be able to compare the ordinary Agency processing of bar inquiries to the disparate treatment given the grievant. The data for years 1993, 1992 and 1991 appears to be as available as that for 1994, which the Agency did furnish. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

17. How many employment verification inquiries did the Office receive from other bars, and how many of those verifications were completed, in 1993? 1992? 1991?

18. In 1994, how many employment verifications did Mr. Dolder complete?

The Agency furnished partial data in October 1995 that "Mr.

Cooper did not complete any employment verification forms in calendar year 1994." It remains necessary to know how many employment verifications Carl Dolder completed in 1994 in order to evaluate and process the grievance. If Mr. Dolder only completed the one form for the grievant in 1994, then that would be evidence that Mr. Dolder was part of a disparate process for the grievant. If, however, Mr. Dolder completed many employment verifications in 1994, then that would be evidence that Mr. Dolder had a role in the Agency normal processing of employment verification inquiries. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing.

22. List the Discontinued Service Retirements approved in fiscal year 1994. For each person: list the position, the Group if an examiner, the circumstances for retirement (e.g., reduction-in-force), when approved, the effective retirement date at the time of approval and the actual retirement date.

The data requested in items #22 and #23 is necessary as the only way to compare the ordinary Agency processing of early retirement to the disparate treatment given the grievant. The Union will use this data to evaluate whether or not to pursue the grievance to arbitration; depending on the content of the data, we may use this data as evidence at an arbitration hearing. The Union will also use this data to advise other members of the bargaining unit.

23. List the early out retirements approved with effective retirement dates in fiscal year 1995. For each person: list the position, the Group if an examiner, when approved, the effective date at the time of approval and the actual retirement date.